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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 745

PAUL DELUCIA

vs.

UNITED STATES OF AMERICA

On petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

Petition for Rehearing

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Petition for Rehearing

May It Please The Court:

Your Honors denied certiorari May 25, 1959. No indication was included to show the non-participation of any Justice of this Honorable Court. We telegraphed and wrote the Clerk of our intention to file this Petition for Rehearing, requesting that he withhold mailing a copy of the order of denial, or that he advise, if application for a stay to a Justice was required. The Clerk treated our telegram and letter as a motion for a stay. The Clerk pre-

sented them to Mr. Justice Clark. Mr. Justice Clark denied a stay. Whereupon we moved in the Court of Appeals for a stay, pending the disposition of this Petition for Rehearing. The Government has opposed our motion in the Court of Appeals upon the ground that Mr. Justice Clark previously denied our motion. Our motion for stay is now pending in the Court of Appeals. In the event that the Court of Appeals should refuse to stay its mandate, we have undertaken to advise the Clerk of this Honorable Court. We shall request that this petition be presented to a Justice of this Honorable Court in support of our motion for a stay of further proceedings, pending disposition.

It appears that Mr. Justice Clark has taken part in the consideration which resulted in denial of certiorari.

The record shows that during the term of Mr. Justice Clark as an Assistant Attorney General, DeLucia was prosecuted and convicted in New York. We quote from a footnote in our petition, p. 32:

> "Your Honors will take judicial notice of the record, printed copy on file in this Honorable Court, United *States* v. *Compagna, et al.* (including DeLucia) 146 F. 2d 524. Certiorari Denied, 324 U.S. 867."

Your Honors will note from 324 U.S. 867, that Mr. Justice Clark there appeared as an Assistant Attorney General. In the trial court the Government was represented by a Special Assistant to the Attorney General. That official appeared for the Government in *United States* v. *Compagna*, 146 F. 2nd 524.

In our petition for certiorari in the case at bar, we said, p. 32:

> "Agent Ruggaber (114) prepared his report from the printed transcript of a case in New York where DeLucia had been convicted."

After Compagna was released on parole, the Government sought to put him back in the penitentiary. Judge Underwood, in *Compagna* v. *Hiatt*, 100 F. Supp. 74, discharged Compagna, on the ground that the warrant had been issued arbitrarily. When this finding reached this Honorable Court, 340 U.S. 880, Your Honors noted that Mr. Justice Clark took no part. We assume that Mr. Justice Clark *sua sponte* recognized his duty to disqualify himself.

Concurrent with the procedure against Compagna and during the term of Mr. Justice Clark as Attorney General, a warrant was issued against DeLucia. In *United States ex rel. DeLucia* v. *O'Donovan*, 82 F. Supp. 435, Judge Igoe held that the warrant had been issued arbitrarily. This discharge was affirmed in *United States ex rel DeLucia* v. *O'Donovan, Marshal*, 178 F. 2nd 876. The Government petitioned Your Honors for certiorari. As appears from 340 U.S. 886, this petition was dismissed. Your Honors noted that Mr. Justice Clark took no part. Here again Mr. Justice Clark must have recognized that his previous association with this litigation should prompt him to disqualify himself.

From the various records, of which Your Honors take judicial notice, it will appear that after DeLucia had been granted parole, in the matter of this New York conviction, he became a football in a political maneuver, made by some of the Republicans to smear the Democrats.

Your Honors will find the reports of the Hoffman Committee printed as part of the record in 340 U.S. 886, No. 9788, Court of Appeals 7th Circuit, *United States ex rel DeLucia* v. *O'Donovan*, we quote, p. 107, 110, from the Report made by Congressman Porter Hardy, Jr.:

> "These attempts by the Chicago Tribune to discredit a Democratic administration, based on unsubstantial rumor, may of course inure to the benefit of a

> member or members of the Republican Party whom the Tribune supports. * * * The Chicago Tribune has sought to use this committee to serve its own private political hatreds and ambitions through baseless attacks on various public officials. It is well known as the medium for expressing the venom of its publisher toward any Democrat and the Democratic Party."

The record in the case at bar includes a printed copy of the proceedings of the Hoffman Committee (our petition p. 68). Mr. Justice Clark was included as one of the targets for this smear campaign and appeared as a witness before the Hoffman Committee.

The printed report (Brown cover) of HEARINGS BEFORE A SUB COMMITTEE OF THE COMMITTEE ON EXPENDITURES IN THE EXECUTIVE DEPARTMENTS, HOUSE OF REPRESENTATIVES, EIGHTIETH CONGRESS, SECOND SESSION, CLARE E. HOFFMAN, CHAIRMAN, was put in evidence below and is now before Your Honors. We quote from this report, p. 600:

> "Mr. Clark * * * But you will have to admit to me that there has been a series of stories, particularly in the Chicago papers, that have continually kept this thing sort of snowballing, by saying, 'Clark did this, Tom Clark did that, Clark is involved here, Clark did this.' Always insinuations and a lot of innuendo about Clark."

The prosecution of DeLucia in New York, the effort to put him back in prison for violation of parole, a deportation proceeding and this prosecution for income tax evasion, all constitute an effort on the part of the prosecuting officials to punish and get rid of petitioner. Mr. Justice Clark happened to be the chief law enforcement officer during a portion of this campaign. As is shown by the record before Your Honors much of the foundation for the present prosecution was laid by officials responsible to Mr. Justice Clark, in his then capacity as Attorney General.

Assuming that at this late day Mr. Justice Clark *sua sponte* determines to disqualify himself, Your Honors must then consider where that places the remaining members of this Honorable Court.

As was said by Mr. Justice Black in *In Re Murchison*, 349 U.S. 133, 136:

> "But to perform its high function in the best way 'justice must satisfy the appearance of justice'."

Also please see the comment by Mr. Justice Frankfurter in *Public Utilities Comm'n* v. *Pollak*, 343 U.S. 451, 466.

In view of the fact that this Honorable Court has granted certiorari in a number of cases involving questions raised by *Jencks* v. *United States*, 353 U.S. 657, our hope is that Your Honors will decide to take the case at bar, along with those cases. Mr. Justice Clark, as Your Honors know, dissented in *Jencks*.

We have a right to guess that in conference Mr. Justice Clark has taken a position contrary to that maintained by petitioner. Of course we have no way of knowing the degree of influence exerted by Mr. Justice Clark in conference. If Your Honors permit the denial of certiorari to stand, with the record showing the participation by Mr. Justice Clark, we respectfully submit that such decision will be a mistake, for reasons now apparent. We say this with all due respect to Mr. Justice Clark and assume that his previous connection with the case did not influence his opinion in the case at bar. We assume further that Mr. Justice Clark took part with no thought of his previous connection. The fact remains that Your Honors have denied certiorari with the participation of a Justice who should have disqualified himself. This fact alone should prompt Your Honors to grant a rehearing. Now that this petition has reminded Mr. Justice Clark of his

previous experience with this litigation, we assume that Mr. Justice Clark will request the proper procedure under the circumstances.

The intervening circumstances of substantial and controlling effect are as follows:

1. Our petition for certiorari was filed March 3, 1959.

2. Your Honors granted certiorari in Nos. 435-436-437, *Harry Lev, et al.* v. *United States* on December 8, 1958.

3. While the *Lev* case was pending our petition was on file and not called to the attention of Your Honors, for the reason that the Solicitor General, without objection, obtained continuances in our case.

4. The *Lev* case, and other cases reached the stage of oral argument. Still our case reposed in the office of the Clerk.

5. We examined the briefs filed in these other cases and endeavored to point out to Your Honors in a FURTHER REPLY that our case presents vital questions more squarely than these other cases.

6. Our FURTHER REPLY was filed on the same day that Your Honors denied certiorari in our case. We conclude that Your Honors did not have the benefit of our FURTHER REPLY and respectfully request its consideration in conjunction with this petition for rehearing. For convenience we have reprinted our FURTHER REPLY as an appendix to this petition.

7. We respectfully refer Your Honors to p. 5 of our FURTHER REPLY, where we have copied questions presented from our petition. To phrase them differently, we have presented the following questions.

A.

Whether a trial judge can make a ruling excluding evidence without letting the defendant know what the evidence is?

B.

Whether a trial judge can evaluate and construe a writing without affording the defendant an opportunity to see the writing and present his contentions concerning its admissibility?

Your Honors have granted certiorari since our petition was filed in cases touching upon the same questions. It is our respectful contention that the case at bar presents the questions more clearly. It is our contention that the Government would be unable to evade and defend in the manner shown by the Government briefs in the other cases.

Since the filing of our petition here the Court of Appeals has in *United States* v. *Davis,* 262 F. 2nd 871, 873, cited the case at bar, *United States* v. *DeLucia,* 262 F. 2nd 610, as authority for the proposition that §3500 is not unconstitutional. We submit to Your Honors that the case at bar presents the constitutional question more clearly than any of the cases in which Your Honors granted certiorari.

If Your Honors decide that §3500 is not unconstitutional, no doubt such decision will be based upon the theory that *Jencks* laid down rules of practice, within the field of Congressional power. In anticipation of the application of such theory, permit us to suggest that the case at bar presents the questions involved much better than any of the other cases in which Your Honors granted certiorari. In the case at bar, our petition p. 167, the Court of Appeals said:

"The Court reviewed the memoranda *in camera* and correctly decided * * *."

The Court of Appeals made no further reference and did not include any hint as to what may have been contained in the withheld statement.

(a) In the courts below, the Government did not assert that the reports were privileged against disclosure on grounds of national security, confidential character of the reports, public interest or otherwise.

(b) The District Judge said clearly that if he thought the material would be of any value, he would have turned it over to the defense.

(c) The District Judge gave no description of the withheld matter. Those concerned are required to remain in the dark and trust to the judgment of the Trial Court.

(d) On the motion for new trial we requested that the Trial Court open the sealed envelope and spread the contents of record.

We quote from the transcript of proceedings p. 26, on file here before Your Honors, on June 12, 1958, showing the argument made to the District Court, on our motion for new trial.

> "Mr. Stewart: I am going to say lets not have any of that secret envelope stuff. * * * Give me a chance to argue from it now * * * not just make a guess or tell you what my information is.
>
> "I am making a suggestion. If that is something we shouldn't have had, lets have daylight on it. Lets spread it of record. Let me have a chance to argue that I should have had it."

In our brief submitted to Court of Appeals and certified here as a part of the record before Your Honors, we said, p. 37: (Emphasis added)

> "In the case at bar we are not dealing with to and from office communications concerning any outside witnesses. We would liked to have known if the

Agents were testifying to opinions in which they themselves had no confidence or belief. Agent Smith was not the only agent involved. We were confronted in the trial with opinions expressed by Agent Stönesifer (379) and Agent King (448). The opinions given by other experts, Ruggaber (245), Mahon (323) and Saldana (525) could have been tested, we believe, more intelligently if the material had not been withheld.

"*During our argument on motion for New Trial,* (642) *we requested that the reports withheld from us be opened and spread upon the record.* This request was opposed and refused. Now in this Honorable Court we are handicapped in presenting an argument concerning papers we have not seen. We respectfully suggest that the report made by Agent Smith should have been put in evidence as part of the case for the Government. The indictment charges the making of false statements on a material matter within the jurisdiction of the Revenue Service. It seems to us that the action taken by the Agents one way or another after having heard the statements, should have been germane. The Government having elected to withhold the report made by the Revenue Agents, we respectfully submit, that that strategy alone should have alerted the District Judge that justice required that the defense should have had the benefit of whatever the facts might have revealed. Without benefit of inspection of the withheld material, we can surmise that if the reports were of help to the Government and did not contradict its theory, the prosecutor would have delivered them. The District Court treated the matter as if we were offering the reports in evidence. Questions which may have arisen as to admissibility never arose. * * *

"The question presented in the case at bar is much broader than that considered in *Jencks*. The question here is . . . can the trial judge permit the prosecutor to withhold evidence in his possession which might assist the jury in determining vital issues. * * *

"By the Court: I think I will go as far as to say to you that almost all of the documents, I think all of the documents and particularly the long, long, long letter, were not the result of any investigation by any one agent nor do they apply to any particular act.

"(436) It is a discussion of the entire matter among themselves, a result of his discussions with different agents and their respective conclusions, which is all speculative.

"It is not subject to cross examination, hasn't any probative value, and I couldn't admit it if you had it before me. * * *

"By Mr. Barnett: (United States Attorney): * * * Whether or not the case was closed or not closed at any stage in the proceeding, to my mind has absolutely no relevancy in connection with the case that is here on trial.

* * *

"By the Court: I didn't want to say that because that might intimate that it was or was not in the files.* I didn't want to comment on it, but I agree with you that even if one agent should or did comment or express an opinion that it should or should not be prosecuted criminally, it wouldn't in the least affect this situation nor would it be admissible before the jury.

"By Mr. Barnett: That is our position, your Honor.

By the Court: I would exclude it.

By Mr. Stewart: Then I think your Honor has committed error, with all due respect. I think you have helped us with our record now.

By the Court: That is all right.

By Mr. Stewart: Thank you. * * *"

Your Honors will note from the various opinions rendered in the District Courts and in the various Courts of Appeal, wherein the defense has been denied inspection,

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* Your Honors will note the care taken by the District Judge to keep us in the dark concerning the contents of the withheld papers.

the court has described the withheld material, sufficiently to show that it was fair to withhold the material.

We illustrate with the following:

United States v. Grunewald, 162 F. Supp. 621

Your Honors will note that Judge Herlands withheld certain papers. The District Judge described these papers sufficiently to show to the defense and to all concerned that the decision was fair and was based upon the law applicable.

United States v. Papworth, 156 F. Supp. 842

The District Court said:

> "But the F. B. I. agent's small note book contained much other confidential information, much of which was wholly unrelated to this case. The defendant has no right to examine such material."

As Your Honors will note, the District Court here made a finding that the withheld material was confidential. A review of such finding might be made *in-camera*. Help in the way of argument from the defense lawyer may very well be not required. Your Honors may very well decide in some future case that it is only fair to conclude that a District Court has made a proper decision, subject to review, again *in camera*, by a Court of Appeals. When this conviction was affirmed in *Papworth* v. *United States*, 256 F. 2nd 125, 129, Your Honors will note that Judge Tuttle took pains to describe the withheld material, in order to show that no error had been committed.

United States v. Waldman, 159 F. Supp. 747

The District Court ordered the material to be turned over to the defense and said, p. 749

> "Finally in the 'statement' in question appear certain paragraphs, not purporting to be what the witness told the agent in detail, but which deal with some preliminary matters."

Your Honors will note that Judge Hartshorne gave some description of the withheld material.

Sells v. United States, 262 F. 2nd 815

We quote, p. 824

> "The excised portions do not relate to any issue presented in the trial. Without the excisions, there was the danger of harm to individuals who were not on time, who did not appear as witnesses, and who were in no way connected with the offense charged against Sells. The excisions properly and reasonably protected such individuals and in no way prejudiced the defendant."

Here again Your Honors will note that the Court of Appeals described the excised material, in order to show to the reader of the opinion that the denial had been made upon sufficient ground.

United States v. Palermo, 258 F. 2nd 397, Certiorari granted, 79 S. Ct. 296, No. 471.

We quote, p. 398

> "The trial court denied the request on the ground that the memorandum was not of the character which was required to be produced under the provisions of 18 U. S. C. A. Section 3500."

Your Honors will note that the Court of Appeals described the withheld material sufficiently to demonstrate that no error had been committed.

United States v. Spanglett, 258 F. 2nd 358

The trial court refused to deliver the Grand Jury testimony of a witness, Gaudin. After holding that *Jencks* and §3500 did not require delivery of Grand Jury testimony, the Court said, p. 341

> "However, now that we read Gaudin's grand jury testimony against his extended testimony on trial we do find one inconsistency."

Then, as Your Honors will note, the Court of Appeals proceeded to quote from the withheld Grand Jury testimony, in order to show that no injustice had been done, by reason of the ruling in the trial court.

Anderson v. United States, 262 F. 2nd 764.

Here, after the defendant had obtained all of the statements, the defense insisted that the file contained more. The judge looked through the file and reported that nothing further could be found. Your Honors could very well hold in some future case that it is not unfair to exclude defense counsel from any offer to help look through the files under the circumstances of this case.

United States v. Lew, 258 F. 2nd 9

This is one of the cases in which Your Honors granted certiorari. The case has been argued and is now under consideration. In all probability Your Honors are now working on opinions to be filed. The Court of Appeals found, p. 13, that the withheld summary was a written record made following the interview and is not substantially a verbatim record of the statement of the witness. It was held that the error, if any, in withholding, was harmless, because the withheld statement in a new trial wouldn't come under §3500. We are informed that whether or not this was fair procedure without permitting counsel for the defendant to participate is one of the questions before Your Honors.

United States v. Miller, 248 F. 2nd 163, 165

The withheld statement was, by stipulation, excluded from the record on appeal. The Court said,

> "Since we cannot know that failure to deliver the statement, properly excised, was prejudicial to the defendant, we do not think a new trial should be ordered."

The Court of Appeals said,

> "*Concededly* the statement contains some matter not related to the subject matter of Michel's testimony." (Emphasis added)

Of course if the defendant concedes that some of the material withheld does not relate to the subject matter, there is no need for the Court to set out, or describe, the withheld material.

United States v. Rosenberg, 257 F. 2nd 760

This is one of the cases in which Your Honors granted certiorari. We refer to this case in our FURTHER REPLY. Your Honors will find that Judge Hastie has described the withheld material, in sufficient detail to justify the action of the trial court. Whether or not the lower courts were in error, is a question before Your Honors. Our point is that the lower court judges described the withheld material. In the absence of such description, the practice of sealing up the withheld material amounts to denial of due process. It is our contention that the practice amounts to a Star Chamber proceeding.

In *Hormel* v. *Helvering*, 312 U.S. 552, 557, Mr. Justice Black said:

> "Rules of practice and procedure are devised to promote the ends of justice, not to defeat them."

Referring to this Honorable Court, Mr. Justice Black said that this Court:

> " * * * has been careful to point out the circumstances justifying the application of the practice in the particular case."

In *Cahill* v. *New York R. Co.*, 351 U.S. 183, 189, Mr. Justice Black dissenting, has collected the authorities for the following:

> " * * * this court has the entire record before it with the power to review the action of that court as well as direct such disposition of the case as that court might have done * * * "

We respectfully suggest that Your Honors direct the Court of Appeals to point out the circumstances justifying the application of the practice of an inspection *in camera*, to include a description of the matter withheld. In fairness, Your Honors could direct that the withheld matter be made available to counsel for petitioner, in order that further argument might be permitted before the Court of Appeals. Argument in which counsel has possession of necessary information. Counsel should not be required to argue while in the dark as to the contents of the withheld

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* Prior to argument before Your Honors in Nos. 435, 436, 437, **Harry Lev v. United States**, Mr. Anthony Bradley Eben, representing Lev, requested permission of the Clerk for leave to inspect the sealed material, in order to be in a position to argue the claimed error. The Clerk refused. In **United States v. Grunewald**, 162 F. Supp. 621, 626 the Court said:

> "'The eight documents will, however, be preserved for possible availability to the Appellate Court. To that end the Court hereby directs the clerk to impound such documents and to keep them intact in a sealed envelope, subject only to the right of the prosecution to have photostatic copies made of said documents under the supervision of the clerk.'"

material. If it happened that the withheld papers were privileged against disclosure on the grounds of national security, confidential character of the reports, public interest, or otherwise, Your Honors might direct that the lower courts so find. But we have no such case here. We trust that upon rehearing, Your Honors will recognize the need of further rules in the interest of fairness. The whole procedure as now conducted must surely offend any sense of justice and be recognized here as contrary to the American way. It reminds one of Star Chamber proceedings. Your Honors are not only expressly empowered by statute (18 U.S.C. § 3771) to prescribe rules of pleading, practice and procedure in the field of criminal law, but Your Honors are also vested with a supervisory authority over the administration of criminal justice in the federal courts. *McNabb* v. *United States*, 318 U.S. 332, 341. Your Honors have expressed sensitive concern with such matters. *Mallory* v. *United States*, 354 U.S. 449, *Benanti* v. *United States*, 355 U.S. 96.

In *Cahill* v. *New York R. Co.*, 351, 183, 184 Your Honors said:

> "We deem our original order erroneous and recall it in the interest of fairness,"

We assume that Your Honors are always interested in fairness. If a defendant is to be deprived of a statement, after inspection by the trial judge *in camera*, it is only fair that the record show in some way, for all to see, that the judge did not abuse his discretion, especially in cases where security is not involved. If *Jencks* is to be regarded as an order for a rule of practice, to be construed with § 3500, there still remains the need of additional guidance, if the application is to be fair, with adequate means of review. The case at bar presents these vital questions.

We were concerned with other points in our petition and neglected the argument now presented. The suggestions herein have been made after examination of the briefs filed in the cases wherein Your Honors have granted certiorari and after consultation with many of the lawyers for petitioners in those cases. In the opinion of some of these lawyers, Your Honors have indicated a division of opinion upon the questions involved. Permit us to respectfully suggest that the case at bar should be included before final decision is made on the other cases. For some of our reasons please see our FURTHER REPLY (Blue cover) now on file in this Honorable Court.

In *Needelman* v. *United States,* 261 F. 2nd 802, decided November 4, 1958, it appears that the petition for rehearing was reached on January 5, 1959. The Court noted, p. 807, that Your Honors had granted certiorari in the cases referred to in our FURTHER REPLY. (*Lev* v. *United States,* Nos. 435, 436, 437 *et al,*) the Court ordered that the parties might show cause why the Court should not await the decision of one or more of those cases by Your Honors, before the Court of Appeals rules on the petition for rehearing.

If by the grant of certiorari we are permitted to brief this matter of fairness in practice, we hope to be able to contribute to the continuance of the effort of Your Honors to see that justice is done according to law. In *Cone* v. *West Virginia Paper Co.,* 330 U.S. 212, 215, Your Honors noted that in three cases certiorari had been granted to consider a point, but Your Honors failed to reach the point, because of the nature of the cases presented. Unless we are granted a rehearing it may be that the same thing will

happen here. Your Honors have granted certiorari in a number of cases in which questions squarely presented in the case at bar may never be reached, because of the circumstances of those cases.

Your Honors must know that *Jencks* and § 3500 introduced a novel situation. In *Jencks* Your Honors were concerned with an effort to be fair. Your Honors must know that any change in rules must be tested by experience, with the help of lawyers engaged in operating under the rules. With all due respect, we seek the opportunity to offer our suggestions. The case at bar presents a record upon which such suggestions can be founded.

A few days before the brief for the Government was due Mr. William A. Barnett, the Assistant District Attorney who had tried the case and who had argued it in the Court of Appeals, asked us if we had any objection to a thirty day continuance, in the matter of the Government brief in opposition here. We said no. Later we received notice from the Clerk that the extension had been granted. Then, as the time for filing aproached under the extension, Mr. Barnett again asked if we had any objection to a further extension. We said no. In a few days we received another notice from the Clerk to the effect that this second extension had been granted. There has been no indication that these motions for extension had ever been called to the attention of this Honorable Court or to any Justice thereof.

At the time of our consents we did not know of the granting of certiorari by Your Honors in Nos. 435, 436, 437, *Harry Lev* v. *United States* and other cases mentioned in our FURTHER REPLY. If we had known of these other cases we would have objected or in some manner called the attention of Your Honors to the fact that the case at bar included questions similar to those upon which certiorari

had been granted. Now, at this late day, we have made an examination of the Rules. As Your Honors know, Rule 24 provides that the Clerk may enlarge the time under the provisions of paragraph 5 of Rule 34. If we understand paragraph 5, the Clerk is authorized to grant but one extension, agreed upon, provided that the Clerk is of a certain opinion. We quote the last sentence of paragraph 5:

> "All other requests for extension of time for filing briefs shall be referred to the court or a justice thereof."

We respectfully submit that when the Solicitor General applied to the Clerk for the second continuance the Clerk had exhausted his jurisdiction and power. Therefore the Clerk should have referred the application to this Honorable Court or a Justice. In such event, Your Honors, knowing that certiorari had been granted in the other cases, may have denied the application for further extension, or the extension may have been granted and in such event Your Honors may have taken our case with the other cases.

By letter, we submitted our construction of the Rules to the Clerk and have received reply as follows:

> "In checking the records and files in this case we find that there was no irregularity in according the government two extensions of time to file the brief in opposition to the petition inasmuch as it appears that you acquiesced in the extension."

Evidently the Clerk has construed the Rules to give him authority to grant any number of extensions, if there be acquiescence. Even if the Clerk has correctly construed the Rules, it must surely be that Your Honors have jurisdiction to review the matter and to determine if the Clerk was warranted in forming an opinion that the extension, (Rule 35, ¶ 5)

> "* * * would not prejudicially delay the disposition of causes not set for argument or impede the progress of the argument calendar * * *"

Surely there must be implied in the Rules a provision that if the Clerk has reason to believe that the requested extension will have the effect of dividing cases, which belong together, to the prejudice of a party, the facts, including the fact that certiorari had been granted in like cases, should be called to the attention of this Honorable Court, or a Justice thereof.

We seek to lock the barn after the horse has been stolen, we know, but if we understand the function of a petition for rehearing, it includes matters such as this. As Your Honors said in *Jencks* v. *United States*, 353 U.S. 657, 668:

> "For the interest of the United States in a criminal prosecution '* * * is not that it shall win a case, but that justice shall be done * * *' *Berger* v. *United States*, 295 U. S. 78, 88."

We assume that this interest of the United States includes the practice of the Solicitor General, as assisted by the Attorney General and the various District Attorneys.

We refer Your Honors to a group of cases, reported in 260 U.S. 695. After the defendants had been convicted in Illinois, they made an attack upon the indeterminate sentence law. After this Honorable Court granted certiorari in one of these cases and pending decision, this Honorable Court, or a Justice thereof, allowed bail to convicted defendants serving time in the State Penitentiary and grouped the cases, pending the outcome of the main, or first case. We mention this history to show some of our reasons for believing that in the determination of whether certiorari should be granted, it has been the policy of this

Honorable Court to grant the writ, after it had been granted in a previous case involving the same question. This policy evidently was carried out after Your Honors granted certiorari in Nos. 435, 436, 437 *Lev* v. *United States*. Your Honors, more or less as a matter of routine, then granted certiorari in the other cases mentioned in our FURTHER REPLY. If the Solicitor General had not obtained the extensions, our case may have been taken with the others. We trust that Your Honors do not blame us for calling that official to strict account. The Government officials appear to us as demanding a pound of flesh. We point to the contract, as embodied in the Rules. The merchant of Venice agreed to the contract, but Portia was able, at a late day, to find a defense, in her request for strict application of the rules. All of this includes the assumption that judges seek to do justice.

Upon reconsideration we trust that Your Honors will grant certiorari in order that we may be heard further on these important questions, in the light of whatever Your Honors might conclude in the other cases.

Respectfully submitted,

WM. SCOTT STEWART
Counsel for Petitioner

CERTIFICATE OF COUNSEL

Wm. Scott Stewart, counsel for petitioner, hereby certifies that this petition for rehearing is presented in good faith and not for delay. This petition is restricted to the grounds specified in Rule 58.

WM. SCOTT STEWART
Counsel for Petitioner

APPENDIX

FURTHER REPLY

to Government's Brief in Opposition

May It Please The Court:

Fearing that our petition for certiorari might have been presented without it, we hurriedly submitted our "Reply to Government's Brief in Opposition". We believed it important that Your Honors be reminded of other cases recently argued. Cases involving the *Jencks* case rule. Since the filing of our Reply we have examined the briefs in some of those cases and now beg leave to present this further reply, in order to prevail upon Your Honors, if possible, to include the case at bar in the matter of interpretation of the law applicable. As may be expected each case coming to Your Honors presents its own factual background. It is our respectful contention that the Government has been able to defend its position in each of the other cases, because of facts in those cases not present in the case at bar. We submit that the *De Lucia* case presents questions squarely, which questions require an answer, sooner or later, for the guidance of the lower courts. The trial Judge said, after an examination of the withheld document, that if he thought it would do us any good he would order its delivery. The trial Judge undertook to decide upon the value of the withheld document. Please again see our petition for certiorari, pp. 136 to 146. We do not believe that the right of any trial judge to do this has been as squarely presented in any of the other cases argued before Your Honors.

In *Holland* v. *United States*, 348 U.S. 121, 124, Mr. Justice Clark said, concerning previous cases:

> "We have denied certiorari because the cases involved only questions of evidence and, in isolation, presented no important questions of law."

Your Honors will agree no doubt, that cases should not be decided in isolation, especially where other cases are on the docket. The Government Attorneys should not be allowed to divide and conquer if any such motive was present in their requests for continuances in the case at bar. To divide may be good strategy, if it were the duty of the Government Attorneys to win at all costs. But as Your Honors have said in *Jencks*, 353 U.S. 657, 668, quoting from *Berger*:

> "For the interest of the United States in a criminal prosecution is not that it shall win a case but that justice shall be done."

In the case at bar important questions have been presented concerning what might constitute justice. A number of cases have been presented and argued before Your Honors involving related questions. We respectfully submit that the case at bar should be included, before Your Honors reach a decision in the previous cases.

We respectfully submit the following observations concerning the previous cases, in support of our contention that the case at bar should be included by Your Honors in the group, before final decision.

Nos. 435-436-437, Harry Lev v. United States.

The record shows that at the time of the trial the prosecutor did not have in his possession the document made the subject of controversy before Your Honors. The case was tried before *Jencks*. After it reached the Court

of Appeals the prosecutor submitted an affidavit in that court, including the controversial statement, which statement was submitted to the Court of Appeals *in camera*. The Government before Your Honors has argued that the error, if any (of non production at trial), was harmless under the circumstances of the case. The Government has put the question, in part, as follows, p. 3, Brief on the merits:

> "3. Whether it was error, under *Jencks* v. *United States*, 353 U.S. 657, for the trial court to deny the request of one defendant for production of what proved to be the summary of a Senate investigator's interview with a witness, where the document had not been seen or approved by the witness and was not then in the possession of the prosecution."
>
> "4. Whether it was reversible error to deny the request for production of the Senate investigator's summary where the testimony of the witness was secondary and largely admitted by the defendant making the request; where the testimony of the same witness before the Senate Committee was available to the defense and was used for impeachment purposes; and where the guilt of all the defendants was proved by overwhelming evidence from other sources."

The defendant in the *Lev* case submitted, among others, the following questions, which we copy from the *Lev* Petition for Certiorari, p. 3:

> "6. Are not summaries and reports of prior statements made by witnesses to a government investigator available to the defendant under the provisions of Title 18 U.S.C., Section 3500?"
>
> "7. Does Title 18 U.S.C. Section 3500 provide the sole procedure by which such summaries and reports are to be made available to defendants?"

Rubin, a co-defendant in No. 437, submits one of the questions involved as follows:

"(2) Whether the Court of Appeals was correct in designating the trial court's concededly erroneous ruling as 'harmless error' because of the enactment of the supervening statute enacted by Congress (18 U.S.C. Sec. 3500(a)(b)(e)(1)(2)) as an aftermath of the decision of the Supreme Court of the United States in *Jencks* v. *United States* (353 U.S. 657)."

The obvious differences between the *Lev* case and the *De Lucia* case are respectfully pointed up, briefly, as follows: In *De Lucia*

(a) The trial was had after *Jencks* and after § 3500 was enacted.

(b) The withheld document in *De Lucia* was in the possession of the prosecutor, it had been seen and signed, we believe, by the witnesses appearing at the trial.

(c) The document reflected the opinion of an expert witness, Stonesifer, who furnished his opinion before the trial jury concerning an important issue and which opinion, given at the trial, we believe, was contrary to the opinion expressed in the document.*

We respectfully submit that the circumstances of the *Lev* case may not squarely present the following questions, which questions we copy from our Petition for Certiorari, No. 745, in the *De Lucia* case:

(1) If § 3500 had not been enacted would it have been error for the Court to refuse to require delivery of the papers on the ground stated, *i.e.*, that they could have been of no value to the defense?

(2) If the answer to (1) is yes, the question arises, was it error to refuse, after application of § 3500?

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* We have not seen the document. We conclude from all of the circumstances of the case, including the refusal of the prosecutor to deliver it, that the document does in fact contradict the witness.

(3) If it would have been error under the *Jencks* case and not error under § 3500, has Congress the Constitutional power to change the practice in the light of that decision?

(4) In view of the fact that the Government was obliged to prove the materiality of certain statements and the Court took this question from the jury by instruction, after an inspection *in camera*, does not this amount to conviction on evidence not heard or seen by petitioner?

No. 451, Rosenberg v. United States.

Your Honors limited the grant of certiorari to the following question which we copy from the Government Brief, p. 2:

> "Is the rule of this Court in *Jencks* v. *United States*, 1957, 353 U.S. 657, a rule of mere procedure, or does it involve a defendant's constitutional rights? May a clear violation of this rule be harmless error? May the conceded error of a trial court in withholding from defense counsel prior statements of principal Government witnesses be excused because a Circuit Court finds that the defense was not hampered in cross-examination of those witnesses? Is it proper for a Circuit Court to determine what use defense counsel might have made of statements erroneously withheld?"

We quote further from the Government Brief, p. 2:

> "As phrased, this question assumes several matters which we dispute, such as a violation of the *Jencks* rule and an alleged conceded error. In our view, the questions presented are as follows:
>
> 1. Whether it was proper for the trial court to examine *in camera* documents produced by the United States Attorney to determine whether they were the kind of documents which should be turned over to the defense under *Jencks* or 18 U.S.C. 3500.

2. Whether petitioner should have been permitted to examine the statements of government witnesses prior to trial."

In the *De Lucia* case no demand before trial was made. The request for the document was made after the witnesses had taken the stand and had given their direct testimony. The prosecutor and the Trial Judge assumed that the document was the kind of document covered by 18 U.S.C. § 3500 and made use of the authority found by them in the statute, by virtue of § 3500, to deny the request for inspection.

Nos. 489 and 491, Pittsburgh Plate Glass Co. v. United States, Galax Mirror Co. v. United States.

The question presented here to Your Honors involves the Grand Jury testimony of a Government witness. The Attorneys for *Galax*, Brief p. 3, have put the question as follows:

"Whether the denial of defendants' motion at the trial for production of the relevant grand jury testimony of the principal prosecution witness for purposes of cross examination constituted error?"

The Court of Appeals, 260 F. 2d 397, 402, said:

"The defendants at no time requested the judge to make a preliminary inspection of the transcript to ascertain whether there was inconsistency. • • • it is now clear that the production of grand jury testimony is not governed by *Jencks* nor by subsequent legislation, nor 18 U.S.C.A. § 3500, but by the Federal Rules of Criminal procedure 6(e), 18 U.S.C.A. which vests discretion in the trial court. (citing cases) • • • (404) The Court did not exceed the proper limits of the sound discretion vested in it by Rule 6(e)."

The *De Lucia* case did not involve the denial of access to Grand Jury testimony.

No. 471, Palermo v. United States.

We copy the question presented from the Government Brief, p. 1:

> "Whether it was error to refuse to allow defense counsel to inspect and use for cross examination a memorandum written by Government agents who had conferred with a witness for the prosecution, where such memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said?"

We quote further from the Government Brief, p. 16:

> "Under the statutory procedure, a summary of prior oral statements prepared by the Government Agents, and which has not been approved by the witness, is not a 'statement' which must be produced for cross examination of such witness."

In the *De Lucia* case the witnesses for the Government had taken the stand. We infer from the circumstances in evidence that these witnesses had executed the document withheld by the Court.

We respectfully submit the certiorari should be granted in the case at bar, before decision in the previous cases.

We respectfully submit that other questions have been submitted to Your Honors upon which certiorari should be granted, for reasons heretofore stated in our petition.

Respectfully submitted,

WM. SCOTT STEWART,
Attorney for Petitioner.